

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In re Application of)	
)	
New Jersey Television Corporation)	
)	File No. BPTTL-19810217TG
For a Construction Permit for a New)	Facility ID 48490
Low Power Television Station on)	
Channel 42, Cherry Hill, New Jersey)	
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: November 4, 2003

Released: November 13, 2003

By the Commission:

I. INTRODUCTION

1. New Jersey Television Corporation ("NJTV") filed an application for review on January 21, 2000, of the Video Services Division's letter denying the petition for reconsideration of the Division's dismissal of the above-captioned application for a construction permit for a new low power television station to operate on channel 42 at Cherry Hill, New Jersey.¹ For the reasons set forth herein, we deny NJTV's application for review.

II. BACKGROUND

2. On September 11, 1998, NJTV's application (File No. BPTTL-19810217TG) was dismissed because it failed to meet the interference protection criteria of Section 74.706 of the Commission's Rules.² Specifically, the Division found that the proposed facilities were predicted to cause objectionable interference to full service television station WTXF-DT, channel 42, Philadelphia, Pennsylvania. NJTV appealed on the grounds that the dismissal of its application for interference after 17 years was a retroactive use of the interference protection criteria, in violation of the Administrative Procedure Act. NJTV also asked to be allowed to file an application for displacement relief. The Division denied NJTV's petition for reconsideration.³ On review, NJTV reiterates that the denial of its petition for reconsideration and dismissal of its application based on the interference protection criteria found in Section 74.706 of the Commission's Rules was a retroactive application of the rule. NJTV also asserts that, at a minimum, its application should be reinstated and it should be allowed to file for displacement relief.

¹ Letter from Hossein Hashemzadeh, Supervisory Engineer, Low Power Television Branch, Video Services Division, Mass Media Bureau, to New Jersey Television Corporation (Dec. 22, 1999) ("*Division Decision*").

² 47 C.F.R. § 74.706.

³ *Division Decision* at 1-2.

III. DISCUSSION

3. On review, we find that the Division fairly considered and properly decided the issues under applicable precedent. Low power television and TV translator (“LPTV”) operations are authorized only on a secondary basis.⁴ Therefore, applicants and licensees in the low power television service have long been on notice that they are required to give way to new operations by primary users of the spectrum, including full service DTV stations operated by existing television broadcasters under our DTV implementation plan.⁵ Further, Section 74.703(a) of the Commission’s Rules expressly provides that “an application for a new low power TV, TV translator, or TV booster station or for a change in the facilities of such an authorized station will not be granted when it is apparent that interference will be caused.” In setting forth this rule, the Commission did not specify a time limit for application processing. Nor has the Commission afforded pending LPTV applicants a right to have their applications processed under any standard other than that provided in our rules at the time their applications are reached and decided.⁶ We therefore reject NJTV’s allegation regarding retroactivity.⁷

4. The Commission has held that “the pendency of applications at the Commission or the failure of the Commission to act on an application within a particular time period does not give rise to any equitable claim by a party allegedly harmed.”⁸ In this regard, it should be pointed out that NJTV’s application was included in Low Power Television Lottery No. L86-1211 held on December 15, 1986, but was not the one selected. Louis Maisel’s application for a construction permit for a new low power television station to operate on channel 42 at Philadelphia, Pennsylvania (File No. BPTTL-840301MY) was the winner. However, Louis Maisel’s application was later dismissed for DTV interference and subsequent appeals, including a request for displacement relief, were denied.⁹ As we earlier indicated, the Commission’s displacement relief measures were extended to LPTV licensees and permittees – not

⁴ See *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Sixth Report and Order (“*Sixth Report and Order*”), 12 FCC Rcd 14588 (1997), *recon. granted*, 13 FCC Rcd 7418 (1998). The Commission’s decisions with regard to this issue have been upheld on judicial review. See *Polar Broadcasting v. FCC*, 22 F.3d 1184 (D.C. Cir. 1994) (table).

⁵ See *Sixth Report and Order on Reconsideration*, 13 FCC Rcd at 7461-62.

⁶ As a general matter, we would not apply superseded substantive rules to a pending application simply because it was filed prior to the implementation of the new rules. To do so would unjustifiably continue in force rules we had determined no longer served the public interest. Any exception to this approach would be explicit and would require justification grounded in persuasive equitable considerations. No such exception applies here.

⁷ In any event, our interference rule does not meet the test commonly used to determine whether a rule has retroactive effect because it does not “impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.” See *Landgraf v. USI Film Products*, 511 US 244, 280 (1994). The Division’s action does not increase NJTV’s liability for past conduct or impose new duties with respect to completed transactions. Nor does NJTV contend that it has a right that was impaired because no right vested on the filing of its application. Cf. *Hispanic Info. & Telecomms. Network v. FCC*, 865 F.2d 1289, 1294-95 (D.C. Cir. 1989) (“The filing of an application creates no vested right to a hearing; if the substantive standards change so that the applicant is no longer qualified, the application may be dismissed.”). See also *Community Television, Inc.*, 216 F.3d 1133, 1143 (D.C. Cir. 2000) (“...the mere filing of upgrade applications did not vest petitioners with a legally cognizable expectation interest. See *Chadmoore Comm., Inc. v. FCC*, 113 F.3d 235, 240-41 (D.C. Cir. 1997). Thus, the FCC was free to alter its criteria for considering those applications.”).

⁸ See *Deleted Station WPHR(FM)*, 11 FCC Rcd 8513, 8516 (1996); see also *Community Service Telecasters, Inc.*, 6 FCC Rcd 6026, 6029 (1991); *Rebecca Radio of Marco*, 5 FCC Rcd 2913 (1990).

⁹ While the applications of NJTV and Louis Maisel were pending on appeal, the Commission opened in August of 2000 an LPTV filing window. Neither NJTV nor Maisel elected to file a major change amendment to its pending application to specify a different channel or a new location that would have resolved the DTV interference problem.

pending applicants – whose facilities were predicted to conflict with a DTV station.¹⁰ We therefore deny NJTV's application for review.

IV. ORDERING CLAUSES

5. Accordingly, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(g) of the Commission's Rules, IT IS ORDERED THAT the Application for Review filed by the New Jersey Television Corporation IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁰ See *Sixth Report and Order on Reconsideration*, 13 FCC Rcd at 7458, 7463-67.